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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 546

GEORGE E. EDDY and SAMUEL SILBIGER,
Petitioners,

PRUDENCE BONDS CORPORATION, *et al.*

PETITION AND BRIEF FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SAMUEL SILBIGER, *Pro se,*
Counsel for Petitioners.

SUPREME PRINTING CO., INC., 41 MURRAY STREET, N. Y. 7, BARCLAY 7-0349
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PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners GEORGE E. EDDY and SAMUEL SILBIGER respectfully pray that writs of certiorari issue to review the three orders of the United States Court of Appeals for the Second Circuit, made in the above entitled matter. By one of said orders (R. 54) said petitioners' application for leave to appeal to said Court of Appeals from an order of the District Court awarding allowances to counsel was denied; by the second order (R. 87) the application by respondent Prudence Bonds Corporation to appeal from such order was granted, "limited to the question of conflict of interest represented"; by the third order (R. 96) on motion of respondents the appeal filed by petitioners from said order of allowances was dismissed (R. 96).

Opinions Below

The Court of Appeals for the Second Circuit rendered no opinion on the applications for the allowance of the appeals or on the motion to dismiss the appeal taken as of right.

Jurisdiction

The order denying petitioners' leave to appeal was entered October 21, 1949; the order granting the limited appeal to respondent was entered October 21, 1949; and the order dismissing petitioners' appeal taken as of right was entered November 7, 1949.

The jurisdiction of the Court is invoked under Section 240(a) of the Judicial Code, as amended 28 U. S. C. Sec. 347a and Section 24c of the Bankruptcy Act, as amended, 11 U. S. C. Sec. 47(c).

Questions Presented

1. Is the proceeding in the District Court below, instituted August 1945, for the determination of the conflicting claims of beneficiaries to distributive shares in Trust Funds, where the Trust Indenture was entered into between the New Corporation formed and the Trustee, in compliance with a decree made in January 1938, confirming a plan of corporate reorganization under Sec. 77 B of the Bankruptcy Act, a Bankruptcy proceeding?

2. Where attorneys for the successful claimants to the Trust Funds were awarded counsel fees by the District Court, is an appeal from the order of the District Court

subject to and governed by the provisions of Section 250 of the Bankruptcy Act?

3. Was the appeal which was duly taken, as of right, from the order of the District Court by petitioners herein, improperly dismissed by the Court of Appeals based solely on the ground that an allowance of the appeal by that Court was a prerequisite under Sec. 250 of the Bankruptcy Act?

4. Was the denial of the application of petitioners for leave to appeal from the order on allowance improper?

5. Was the granting of the application of respondent Prudence Bonds Corporation, and the limitation of the appeal to the question of the "conflict of interest represented" proper?

6. Did the Federal Court err in refusing to allow and take cognizance of petitioners' appeal, on the merits, and in arriving at a determination of what is reasonable on the basis of the rule in New York State, as a standard for the proper evaluation of services of counsel rendered on a contingent basis?

Statement

The plan for the reorganization of Prudence Bonds Corporation was confirmed on January 18, 1938 (Prior record, p. 341*), including separate plans of reorganization for each of the Eighteen Series of its First Mortgage Collateral Bonds.

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*"Prior record" refers to record in petition for writ of certiorori, *Prudence Realization Corporation* v. *Eddy*, 333 U. S. 845.

Pursuant to the confirmed plans, a new corporation with the same name as the Debtor was organized in February 1938, and it entered into Supplemental Trust agreements with City Farmers Trust Company, as Successor trustee of each of such eighteen series of bonds (Prior record 345; 351). These agreements were approved by the District Court and the plans were made effective as of March 1st, 1938 (Prior record 116-117).

As directed by the order of the District Court, the indenture trustees who were superseded by the new trustee, transferred the respective trust res to the successor trustee, and, pursuant to such order, filed their respective accounts and prayed a judicial settlement thereof (Prior record 117). Likewise, pursuant to such order, the Debtor and its Reorganization Trustees, as of March 1, 1938, transferred and assigned all their rights and interests in the Debtor's estate and the equities in the Trust Estate to the new corporation (Prior record 117). The Debtor's Trustees have not filed their account, and no final order closing the reorganization proceeding has as yet been entered.

Extensive litigation then ensued relating to the accounts of the superseded trustees, resulting in the cases of *Central Hanover Bank & Trust Co.* v. *President and Directors of the Manhattan Company,* 105 F. 2d 130; *Manufacturers Trust Co.* v. *Kelby,* 125 F. 2d 650, cert. denied 316 U. S. 697; *Brooklyn Trust Co.* v. *Kelby,* 134 F. 2d 105, cert. denied 319 U. S. 767; *President etc. of the Manhattan Co.* v. *Kelby,* 147 F. 2d 465, cert. denied 324 U. S. 866; *Eddy* v. *Kelsey,* 148 F. 2d 323. Also, in a prior application to this Court for a writ of certiorari to the Court of Appeals for the Second Circuit involving a situation relative to counsel

fees awarded on such accounting proceedings, this Court denied certiorari 319 U. S. 755 and in relation to an appeal on the merits with respect to counsel fees awarded, affirmed by the Court of Appeals by a divided court, *Eddy* v. *Kelby*, 163 F. 2d 56, this Court denied the petition for a writ. 322 U. S. 836.

In the reorganization proceeding, petitioner Silbiger appeared as attorney for George E. Eddy and also represented Bessie B. Reilly and Katherine Born. Mr. Eddy was the holder of bonds in eleven series, AA, 3rd, 5th, 6th, 8th, 12th, 13th, 14th, 15th, 16th and 18th; Bessie B. Reilly held bonds in the 11th Series, and Katherine Born in the 4th and 16th Series.

Petitioner Silbiger appeared as attorney for each of his clients in the respective accounting proceedings in which they held bonds, filed objections for each of them respectively in the series in which they were bondholders, and on the conclusion of such proceedings was awarded compensation for his services payable out of the funds realized by way of settlement with or a surcharge of such trustees (Prior record, 138).

From the time of the confirmation of the plans in 1938, and as of from March 1st, 1938, the new corporation serviced the collateral securing the respective trust funds, and the successor trustee performed its functions, pursuant to the plans and the terms of the Supplemental Trust Indentures.

After this Court denied the petition of *President & Directors of the Manhattan Co.* as Trustee of the 5th and 9th Series for the writ of certiorari respecting its account-

ing as decided in 147 F. 2d 465, 324 U. S. 866, the surcharge decreed against said trustee was paid (Prior record, 142), and the New Corporation on August 2, 1945, initiated proceedings in the District Court for instructions as to the allocation and distribution of the trust funds respectively in Series Fifth and Ninth (Prior record, 108, 532). Later, it applied for similar instructions as to the Sixth Series, and City Bank Farmers Trust Co. initiated its proceeding for such instructions as to all series except the Fifteenth (Prior record, 492, 429).

By the process of the slow liquidation of the trusts created by the plans and supplemental trust agreements, the trust funds were in such condition that in eight of the series the trust funds were adequate to pay the principal of the priority bonds held by the general public, and to leave a substantial surplus, aggregating approximately $2,000,000. In the other ten series the trust funds were inadequate to pay the principal of the publicly held bonds. Among the deficient series as to principal were the Fourth and Sixteenth Series, in which Katherine Born held bonds, and the Eleventh Series, in which Bessie B. Reilly held bonds.

Prudence Realization Corporation, Successor to The Prudence Company, Inc., the guarantor of the publicly held bonds as to principal and interest at the rate of 5½%, was the holder of subordinate bonds aggregating $1,910,300 distributed in all eighteen series, and President and Directors of the Manhattan Company was the holder of a subordinate lien on the Fifth Series Trust Fund in the amount of $85,825 and on the Ninth Series Trust Fund in the sum of $88,124.98.

The condition of the Trust Funds showing an excess over the amount of principal due on the publicly held bonds, the subordinate liens on such funds, and the surplus is as follows:

Series	*Excess over principal due Publicly Held Bonds*		*Subordinate Bonds of Prudence Realization Corporation*	*Subordinate Liens*	*Surplus*
AA	$ 288,599.29		$ 138,100.00		$150,499.29
5th	360,610.22		67,200.00	$ 85,825.00	207,585.23
6th	182,249.72	($311,200)—	182,249.72		0
8th	207,368.21		193,200.00		77,168.21
9th	463,285.24		105,700.00	88,124.98	269,460.26
12th	209,116.50	(390,500)—	209,116.50		0
17th	135,840.99		92,500.00		43,340.99
18th	84,383.62		21,800.00		62,583.62
	$1,994,453.79		$1,009,866.22	$173,969.98	$810,637.59

In each of said series the excess over the principal due the publicly held bonds was inadequate to pay the deficiencies of interest at 5½% per annum due on the Bonds (Prior record, 54, 547).

Upon the reports and recommendation of the Special Master relating to the Fifth and Ninth Series proceedings, the District Court rejected the contention of the public bondholders that they were entitled to receive full payment of their bonds with interest at 5½% per annum; sustained the contentions of Prudence Realization Corporation that it was entitled to payment of its subordinate bonds aggregating $1,009,866.22; sustained the claim of President & Directors of the Manhattan Company to the payment of the liens aggregating $173,969.98; rejected the claim of President & Directors of the Manhattan Co. to the entire surplus then remaining in the Fifth Series and to the

surplus in the Ninth Series to the extent of $120,007.98 by way of recoupment of the sums with which it had been surcharged, and adjudged that the said surpluses in six of said series, aggregating $810,637.59* was payable to City Bank Farmers Trust Company as Trustee of the other Series of Bonds, where there was a deficiency of collateral to pay the outstanding bonds, subordinate as well as unsubordinate. (*R. Prudence Realization Corporation* v. *Eddy,* 333 U. S. 845; Petition for Certiorari Brief, Appendix B, at p. 25).*

Four orders relating respectively to the Fifth, Sixth, Ninth and All Series allocation proceedings were thereupon entered. On the consolidated appeals from said orders the Court of Appeals reversed the District Judge (*Eddy* v. *Prudence Bonds Corporation,* 165 F. 2d 157) and this Court denied the petition of Prudence Realization Corporation for a writ of certiorari to the Court of Appeals (333 U. S. 845).

It is for his services in these allocation proceedings in the District Court, the Court of Appeals for the Second District and this Court, whereby petitioner successfully sustained the exclusive rights of the Public Bondholders in Series AA, 5th, 6th, 8th, 9th, 12th, 17th and 18th to the sums aggregating approximately $2,000,000 that petitioner applied to the District Court to fix the amount of his liens on the respective trust funds in said series in the aggregate amount of $459,500 and unrecouped expenses in the sum

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*The slight variance in the figures is due to the fact that the figure $774,252.99 reflects the condition of the trust funds as of August 31, 1946, while the figure stated shows the condition as of August 31, 1948.

of $1,002.74. Objections to the award of any allowance to Silbiger were interposed by the respondents Prudence Bonds Corporation and Reconstruction Finance Corporation.

Petitioner Silbiger's application, as well as the requests of other counsel were referred to a Special Master for hearing and report, and he recommended that allowances be awarded to all counsel in the aggregate sum of $102,500, equivalent to approximately 5% of the sums involved in the mutually exclusive antagonistic claims to the funds. Of this total he recommended that $75,000 be awarded to petitioner.

The learned District Judge in passing on the report of the Special Master increased the total award to all counsel to $107,500 by increasing from $15,000 to $20,000 the allowance recommended to Weil, Gotshal & Manges, Esqs. Except for such modification of the recommendation of the Special Master the opinion of the District Judge states "I do not think I can, or should, substitute my own views for those expressed by the Special Master." The order awarding such allowances was entered July 29, 1949.

Because petitioner Silbiger considered that the award to him under the circumstances of this case was grossly inadequate and predicated on erroneous theories of law, petitioners sought a review by the Court of Appeals. Their Notice of Appeal was served on September 6, 1949. As a precautionary measure, petitioners likewise filed a petition in the Court of Appeals for leave to appeal. Respondents Prudence Bonds Corporation and Reconstruction Finance Corporation filed a notice of appeal on September

6, 1949, and likewise petitioned for leave to appeal. The respective orders denying petitioners leave to appeal and granting respondents limited leave to appeal on the issue raised of a conflict of interest represented, were made on October 21, 1949, and on November 7th, 1949 petitioners' appeal taken as of right was dismissed on motion of the respondents.

Specifications of Errors to be Urged

The Court of Appeals for the Second Circuit erred:

1. In construing Section 250 of the Bankruptcy Act as applicable to the case at bar.

2. In summarily dismissing petitioners' appeal.

3. In refusing to grant petitioners leave to appeal, if an appeal does not lie as of right.

4. In granting to respondents Prudence Bonds Corporation and R.F.C. leave to appeal limited to the issue of a "conflict of interest represented."

5. In failing to take cognizance of and reviewing the whole case on the merits.

And that the District Court erred:

a. In its ruling that it could not substitute its "own views for those expressed by the Special Master."

b. In failing to arrive at his own independent informed opinion as to the New York rule in evaluating services of counsel and applying it to the facts in this case.

c. In failing to decide that within the law and the rule as applied in New York State the fees requested by petitioner Silbiger are fair and reasonable and should be allowed him.

Reasons for granting the Writs

The refusal of the Circuit Court of Appeals for the Second Circuit to review the decision of the District Court on the merits presents an important question of Federal Law and Procedure which ought to be settled by this Court.

The failure of the District Court to arrive at an independent and informed judgment of what, under the rules in New York State, constitutes a reasonable fee for counsel rendering services on a contingent basis, and to apply such rule to the facts of this case, violates established principles of law and conflicts with the decisions of this Court. *Erie* v. *Tompkins,* 304 U. S. 64.

The issues presented in this case involve the proper relationships between attorney and clients, as also between attorneys and the Court, and this Court should authoritatively establish and define what is "reasonable" and what constitutes an "abuse of discretion" when a court is determining or passing upon the reasonable value of attorneys' services, and by what standards such reasonable value is to be arrived at, so that both the bench and bar may know that the rights of attorneys are according to such standards and measured thereby. In that way, the value of an attorney's services will not be dependent upon the mere accident of the determination thereof being thrown into the lap of Judge A, B, C, or D.

WHEREFORE, your petitioners respectfully request that Writs of Certiorari be granted as prayed.

SAMUEL SILBIGER, *pro se.*
Attorney for Petitioners.

Dated, January 14th, 1950.

STATE OF NEW YORK, }
COUNTY OF KINGS, } ss.:

SAMUEL SILBIGER, being duly sworn, says: That he is attorney for petitioner George E. Eddy and is also one of the petitioners herein; that he has read and knows the contents of the within petition and it is true in all respects as he verily believes.

SAMUEL SILBIGER.

Sworn to before me this
14th day of January, 1950.

FRANCES W. SYBELL
Notary Public, State of New York
Qualified in Kings County
Kings Co. Clk's No. 686, Reg. 1341-S-0
N. Y. Co. Clk's No. 2066, Reg. No. 1998-S-0
Queens Co. Clk's No. 1153, Reg. No. 282-S-0
Nassau Co. Clerk's No. 64-S-50
Commission Expires March 30, 1950

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

POINT I

The appeal to the Circuit Court was properly taken as of right.

The services for which Appellee Silbiger sought to have his lien fixed and determined by the Court were not such as are comprised within or intended to be regulated by Article XII of the Bankruptcy Act.

Sec. 243 of the Act provides:

> "The Judge may allow reasonable compensation for services rendered * * * by creditors * * * or the attorneys for any of them, in connection with the submission by them of suggestions for a plan or of proposals in the form of plans, or in connection with objections by them to the confirmation of the plan,

> or in connection with the administration of the estate. In fixing any such allowances, the Judge shall give consideration only to the services which contributed to the plan confirmed, or which were beneficial in the administration of the estate * * *."

Obviously the provisions of Sec. 250* of the Act apply to appeals from allowances awarded pursuant to the power conferred upon the Court by Section 243, and where the power to award allowances does not stem from such section, but from independent equity considerations, any party aggrieved by a decision of the Judge on the question of his lien for services has the same right of appeal that exists in connection with an ordinary Equity proceeding.

The services for which Sec. 243 confers the discretion on the Judge to award allowances are such services as relate to the formulation, adoption or rejection of a plan, or the administration of the estate during the process of such formulation, adoption or rejection of a plan.

The power so conferred by said Section was exercised by the Judge as far back as 1938 and awards of allowances were made to counsel who rendered services relating to such formulation, adoption or rejection of the plan and the administration of the estate. Those allowances were reviewed by the Court of Appeals in 122 F. 2d, 258.

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* Sec. 250. Appeals *may be taken* in matters of law or fact from orders making or refusing to make allowances of compensation or reimbursement, *and* any, in the manner and within the time provided for appeals by this Act, be taken to *and allowed* by the circuit court of appeals *independently of other appeals in the proceeding,* and shall be summarily heard upon the original papers.

When, in 1938, pursuant to the decree of the District Court, the Debtor and its trustee transferred and assigned all their rights and interests to the New Corporation and the indenture trustees transferred the respective trust res to the Successor trustee, the plan of reorganization was consummated and became effective as of March 1, 1938. Thereafter the several trust estates and trust res were not being administered by the Court, but were administered by the Successor Trustee of the several trust funds and the respondent Prudence Bonds Corporation pursuant to the Supplemental Agreements entered into between them.

The proceedings for instructions by the new corporation and the Successor Trustee were suits in equity to obtain an adjudication of the rights of conflicting claimants to the trust funds. The power of the Court to fix and grant allowances to counsel for services in such proceedings is not rooted in any provision of the Bankruptcy Act, but stems from the broad rules of the common law and equity as established in the case law and as preserved in New York State by Sec. 475 of the Judiciary Law, which confers upon an attorney a lien for his services on a cause of action or any judgment or decree entered therein. *In re Heinsheimer,* 214 N. Y. 361, 364. The proceeding to establish such lien is a separate Special proceeding. *Smith* v. *First National Bank of Albany,* 103 Misc. 274, 170 N. Y. S. 595.

The establishment of an attorney's charging lien has long been a recognized right in the Federal Courts. In the case of *Sprague* v. *Ticonic Bank,* 307 U. S. 161, this Court said:

> "The allowance of such costs in appropriate situations is part of the historic equity jurisdiction

in federal courts. The suits 'in equity' of which these Courts were given 'cognizance' ever since the First Judiciary Act, constituted that body of remedies, procedures and practices which theretofore have been evolved in the English Court of Chancery, subject of course, to modifications by Congress * * *. To be sure, the usual case is where through the complainant's efforts a fund is recovered in which others share. * * * "

POINT II

(a) The fee of $75,000 awarded to Mr. Silbiger is grossly inadequate, unfair and unreasonable and contrary to equity and the established criteria of precedents and the law.

(b) The fees requested by Mr. Silbiger in the aggregate sum of $459,500.00 are fair, reasonable and equitable, commensurate with the benefits conferred and are supported by equitable principle, controlling precedents and the law.

The Special Master based his recommendations on the theory that "Mr. Silbiger's contention that he is entitled to a lien to the extent of 22 per cent of each fund in series in which there are sufficient funds to pay interest on bonds, even though he did not represent bondholders in each series, is not tenable". The conclusion is not predicated on any precedent cited by the Master, and the only case, *Sprague* v. *Ticonic Bank*, 307 U. S. 161, 165, considered by him, is a controlling authority to the contrary.

The Master recognized that compensation to Mr. Silbiger must be commensurate with the benefits derived from

his services. What he failed to point out in his report, is the amount of the benefits upon which he computed or based his estimate of the value of Mr. Silbiger's services, or the ratio of such value to the benefits. Obviously, as he ruled that Mr. Silbiger was not entitled to any allowance in the Sixth, Ninth and Seventeenth Series, because he had no client owning bonds in said series, he failed to take into consideration the $781,376.05 realized by the bondholders in such series. By his ruling that here was but one proceeding, *i.e.*, that relating to the Fifth Series, he eliminated from consideration all benefits accruing to any bondholders except the Fifth Series—the benefits to the bondholders in which series he estimated at $400,000. On this basis he arrived at his recommendation of $100,000 as the value of the combined services of Mr. Silbiger, Mr. Miller and Weil, Gotshal & Manges, Esqs..

Concededly, in an equitable proceeding, allowance of counsel fees is in the discretion of the Court. That does not mean that it is an arbitrary or unlimited discretion, but it means that the Court must in fact exercise its discretion, and where under the law and principles of equity jurisprudence, allowances are to be made, it is the duty of the Court to arrive at an informed judgment of what is fair and reasonable. The criterion of what is the fair and reasonable value of legal services is the customary compensation paid counsel where the fee could be fixed by agreement in advance and the usual rate of compensation for such services. *Middleton* v. *Bankers, etc.*, 37 F. 2d 524.

In *Woodbury* v. *Andrew Jergens Co.*, 37 F. (2d) 749, the Court says:

> "The value of a lawyer's services is not measured by time or labor merely. The practice of law is an

art in which success depends as much as in any other art on the application of imagination—and sometimes inspiration—to the subject matter. The exercise of these faculties may occur at any stage in a case, though their influence on the course of the proceedings may not be established till its outcome. In order, therefore, accurately to chancer the value of a lawyer's services, *one must always examine them in the light of the event.* * * * " (Italics supplied.)

In New York State agreements for contingent fees are sustained and it has been held that a contingent fee of one-half of the recovery is not, of itself, unconscionable, in the absence of fraud, or unless the nature of the claim is such as to evince a disposition on the attorney's part to take an undue advantage over his client. *Morehouse* v. *Brooklyn Heights R. Co.*, 195 N. Y. 537; *Matter of Fitzsimmons*, 174 N. Y. 15; *Friedman* v. *Mindlin*, 91 Misc. 473, 155 N. Y. S. 295.

Such contingent fee contracts are enforceable and adjudged fair, equitable and conscionable regardless of how large a sum might ultimately be recovered. *Ransom* v. *Ransom*, 147 App. Div. 835, 133 N. Y. S. 173.

In the case last cited there was involved the establishment of a widow's claim to a share in her deceased husband's estate. Such share was of the value of $400,000 and it was held that a contingent fee contract to pay counsel 25 per cent of the sum realized was not unreasonable or unconscionable.

So, where the rate of compensation to the benefits has not been agreed on in advance, and it devolves upon the Court to determine the value of an attorney's services,

what rate is fair and reasonable under the circumstances is a fact to be decided by the Court upon the evidence and the customary usage and practice of the legal profession and the Courts.

The cases at bar are analogous to stockholders' derivative suits and are representative in character. In fact, Mr. Eddy stepped into the shoes of the Trustee of the various trust funds—by whose failure to come forward and protect the trust funds against illegal assault, it became necessary for a bondholder to step into the breach and, at his risk, assume the burden of protecting the rights of all bondholders.

Recently, the Court of Appeals for the Second Circuit in *Certainteed Products Corporation* v. *John A. Topping,* 171 F. 2d 241, referred to what constitutes reasonable counsel fees and cited the articles of Mr. Hornstein, 39 Col. L. Rev. 784; 42 Col. L. Rev. 574, 587; 47 Col. L. Rev. 1, 24, N. 3 p. 15.

A perusal and analysis of the cases cited in said articles indicate that the courts consistently approach the question of what is a reasonable counsel fee, where the services are rendered upon a contingent basis, from the point of view that the awards to counsel should not be niggardly but rather liberal as in cases of salvage. The percentage of the benefits awarded as counsel fees usually range between 20 to 33 1/3 per cent of the sum realized or saved, and the courts usually have not been timid because of the huge sum that might be involved.

In *Murphy* v. *North American Light & Power Co.,* 33 Fed. Sup. 567, as in the case at bar, no estate or fund was

created. There, the question involved was one affecting the priority rights of preferred stockholders under a contract. Here similarly was involved the priority rights of bondholders under a contract. The Court said:

> "Allowances in causes of this kind, however, should not be niggardly for appetite for effort in corporate therapeutics should, as in salvage and in bankruptcy cases, be encouraged. In re Osofsky, 50 F. 2d 925, at page 927."

Cited with approval by the Court of Appeals for the Second Circuit in *Smolowe* v. *Delendo Corporation,* 136 F. 2d 231 at 241.

In *Neuberger* v. *Barrett,* 180 Misc. 222, 39 N. Y. S. 2d 575, there was realized by way of settlement—not by virtue of a judgment after trial—the sum of $653,744.72, plus an indeterminate amount of saving for the future. On petition for allowances to counsel, the Court said:

> "Consideration must be given to the fact that fees here, as in most of these cases, were contingent on some recovery by settlement or otherwise. The attorneys and accountants always took the risk that their time and efforts might go for naught.
>
> "Most of the work is generally done before trial, so even though there was no trial here, I have concluded that $200,000, *or about 30 per cent of the fund* should be set aside for distribution among those attorneys and accountants who contributed to its creation, plus $568.35 which is the total of the disbursements incurred in the process." (Italics supplied.)

In *Winkelman* v. *General Motors Corporation,* 48 Fed. Supp. 504, a settlement of a stockholders' derivative action

resulted in a recovery of $4,500,000. Several lawyers and law firms were participants in the litigation. Allowances were made including $100,000 for accountants' fees and disbursements, aggregating $895,000, approximately 20 per cent of the recovery.

It will be observed that in the cases listed by Mr. Hornstein, 39 Col. Law Rev. 1939, p. 784, the three cases nearest approximating the result achieved in the case at bar are *Adams* v. *Rockefeller,* where the results achieved were $2,500,000 and the allowance awarded $833,333.33 or at the ratio of *33 1/3 per cent*; *Bookbinder* v. *Chase Nat. Bank,* the sum realized was $2,500,000, and the fees awarded $625,000 or *25 per cent;* and *Gallin* v. *National City Bank,* where the sum realized was $1,844,642.21, and the fees awarded were $427,500 or *25 per cent.*

The rationalization of the theory on which the decision in *Adams* v. *Rockefeller supra,* was based found approval by Valente, *J.* in *Benedict* v. *Seagrave,* N. Y. L. J. June 24, 1937, p. 3190, col. 4 In that case the amount involved was $723,500 and the allowance to counsel was fixed at 33 1/3 per cent or $239,605.03. The Court said:

> "Under all the facts and circumstances of this case I am convinced that the fee requested by the plaintiffs' accountants, and consented to by the defendant corporation, is fair and reasonable.
>
> "A similar application came up in the case of *Edwin Adams et al.* v. *William Rockefeller et al.* (District Court, Southern District of New York, No. 138 - E. 13-63.) That case involved the settlement of a similar derivative stockholders' action for the sum of $2,500,000. A fee of one-third of this amount, or $833,333.67, was awarded plaintiffs' attorneys as

counsel fee. In an opinion rendered December 28, 1920, Judge Hough, in approving the settlement and awarding that amount to the plaintiffs' attorneys, stated in part as follows: 'It is substantially admitted that the plaintiffs have but furnished their names; the corporate defendant has been no more than a spectator, the work has been done wholly by counsel on both sides, and so far as any fruit is produced, it is wholly the work of plaintiff's counsel. Large as the settlement is, I see no reason why the rule usual in this jurisdiction in respect to recoveries of sums largely speculative by counsel operating on contingent fees should not be applied, and I award one-third of the settlement to plaintiffs' counsel."

This case came up again before Judge Hough in a subsequent application to apportion counsel fees among the various attorneys in the litigation, and in connection with that application Judge Hough further stated in an opinion rendered April 6, 1921:

> "The fee or remuneration awarded to the solicitor of record or his associates was, in appearance, very large indeed, but it was not directed to be paid principally for legal or intellectual service at the law, although great industry and ability has been manifested on the part of the plaintiffs herein. It was and in my judgment is payable for great courage and business skill in absolutely creating a very large sum of money which the recipient thereof had never had courage to go after, and had indeed refused even to ask for—much less had that recipient been willing to sue and labor therefor. Consequently, the recovery was and in my opinion should be treated like a case of salvage on a derelict."

If as the Court stated in *Dickinson* v. *Cowin*, 309 U. S. 382, the purpose of Section 250 of the Bankruptcy Act is to avoid frivolous appeals from orders and allowances, and if the attempted appeal by petitioner is to be considered as governed by the provision of said Section, then, it cannot, in the light of the established precedents cited above, justly be said that such attempted appeal is "frivolous." The Court of Appeals in the exercise of its discretion should have granted the petition of Appellees for leave to appeal, and reviewed the whole controversy on the merits.

Reputable attorneys are keenly sensitive to their relationship to their clients, the Court and the public. They seek to observe the proprieties with meticulous care, to avoid the finger of scorn and ridicule being pointed at them or the profession and to avoid any breach in their conduct which will justify the slightest reproach or censure by the Court. Among these proprieties must be included a fair approach by them to their clients and to the Court in the charging of fees for services.

Obviously, therefore, the law is in a hopeless, chaotic state if what is "reasonable" for an attorney to charge and expect to be awarded for his services is entirely dependent upon accident, whether he appears before a Judge Hough, a Judge Valente, or any Judge of like psychology, as indicated in the precedents cited, or before a Judge whose mental reactions are in complete conflict with the generally accepted view that 25 per cent to 33 1/3 per cent of the sums recovered or saved is what an attorney can and should charge when he accepts a retainer and performs services entirely upon a contingent basis. If, under the generally accepted view, 25 per cent to 33 1/3 per cent is

reasonable, a limitation of counsel's recovery to but 5 per cent of the sum recovered and saved to the clients is unjustifiable, indefensible and grossly inadequate. The limitation in the case at bar of the fees to approximately 5 per cent is hopelessly irreconcilable with the precedents—and both such precedents and the instant case cannot be correct.

A review of the decision below is therefore urgent, so that if the instant case represents the correct view, it may be authoritatively established, and counsel then will not be subject to criticism, or be the victims of recrimination and abuse, as they will not then seek compensation in circumstances as in the case at bar, so greatly out of proportion to what the award made by the Court below determines is fair and reasonable.

CONCLUSION

The petition for writs of certiorari should be granted.

Dated: New York, January 16th, 1950.

Samuel Silbiger, *Pro se,*
Counsel for Petitioners.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 546

GEORGE E. EDDY and SAMUEL SILBIGER,
Petitioners,

PRUDENCE-BONDS CORPORATION, et al.

BRIEF OF RESPONDENT PRUDENCE-BONDS CORPORATION IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI

Opinions Below

The Court of Appeals for the Second Circuit rendered no opinions in making the three orders which petitioners seek to review.

Jurisdiction

Two of the orders were entered on October 21, 1949 (R. 68-69); the third order was entered on November 7, 1949 (R. 76). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended, 28 U. S. C., Sec. 347(a) and Section 24c of the Bankruptcy Act, 11 U. S. C., Sec. 47(c).

Petitioners' Questions

The substance of the questions petitioners seek to raise is:

1. Whether the Court of Appeals abused its discretion in denying petitioners' application for leave to appeal an order made in a bankruptcy reorganization proceeding awarding an allowance of $75,000 to petitioner Silbiger and allowances totaling $32,500 to three other attorneys for services in a proceeding in the reorganization court to construe the confirmed Plan of Reorganization of the Debtor.

2. Whether the order on allowances was appealable by petitioners as of right by notice of appeal and without leave of the Court of Appeals.

On an earlier occasion in this reorganization these same petitioners, in an effort to increase a prior allowance of $6,000 awarded to petitioner Silbiger, sought to raise these same questions and their petition for certiorari was denied (R. 49, 72; *Eddy* v. *Kelby*, 319 U. S. 755).*

Preliminary Statement

Petitioners seek review of three orders of the Court of Appeals for the Second Circuit. Under the decision of this Court in *Dickinson Industrial Site, Inc.* v. *Cowan*, 309 U. S. 382, two of the orders were within the discretion of the Court of Appeals and the third order was required as a matter of law.

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* On still another occasion, this Court denied a petition of these same petitioners to review an order of the Court of Appeals affirming on the merits an order of the bankruptcy court awarding petitioner Silbiger an allowance of $40,000 (*Eddy* v. *Kelby*, 163 F. 2d 56, cert. denied 332 U. S. 836).

The first of the orders denied petitioners' application for leave to appeal the order of the bankruptcy court (Eastern District of New York) awarding allowances as aforesaid (R. 30, 69).

The second order granted respondent Prudence-Bonds Corporation (New Corporation) and Reconstruction Finance Corporation (hereinafter called "RFC") leave to appeal the order on allowances, but limited the scope of their appeal "to the question of conflict of interest represented" (R. 68-69).

The third order dismissed, on motion of respondent, an appeal petitioners sought to take from the order on allowances as a matter of right by filing a notice of appeal (R. 69-70, 75, 76).

The applications for leave to appeal were timely made and petitioners' notice of appeal was timely filed and this is not a case where a party has made a justifiable mistake in pursuing the wrong method of appeal.

Petitioners' ultimate object in seeking certiorari is to increase the allowance of $75,000 awarded to petitioner Silbiger (R. 30).

Petitioner Eddy, a bondholder client of petitioner Silbiger (R. 51), did not apply for any allowance (R. 5) and is not aggrieved by any of the three orders. Petitioner Silbiger did not oppose the application of respondent and RFC for leave to appeal (R. 49), and is not aggrieved by the limited leave to appeal granted to said applicants (R. 68-69).

Since the three orders were made, the limited appeal of respondent and RFC was taken, heard and decided; the Court below unanimously holding that Mr. Silbiger represented two groups of bondholders who had conflicting interests in the proceeding in respect of which Mr. Silbiger rendered his services, that Mr. Silbiger opposed and was disloyal to one of the interests he represented, and, that the amount of his allowance should be reduced "by at least one-third" or more at the discretion of the bankruptcy court Judge (*Silbiger, et al.* v. *Prudence-Bonds Corporation*, C. C. A. 2, March 7, 1950).

The Facts

The order of the bankruptcy court which petitioners sought to appeal was made in the proceeding for reorganization of Prudence-Bonds Corporation, Debtor, under Section 77B of the Bankruptcy Act (R. 1, 30). Although the Plan of Reorganization was confirmed in 1938 (R. 8), the Debtor's Estate is in process of administration in that respondent, the Trustee of the Debtor, and other parties have been and still are engaged in accounting proceedings to compel restoration of trust funds securing the Debtor's bonds (R. 9).

The Trustee of the Debtor is still acting, no report has been filed showing that the Plan has been carried out, and no final decree has been entered closing the estate (R. 71).

When the Debtor filed its petition for reorganization it had outstanding eighteen Series of bonds, each secured by a Trust Agreement made by the Debtor to a Bank or Trust Company, as Trustee, under which bonds and mortgages and other securities were assigned and delivered to the Trustee as a Trust Fund for the benefit and security of the bondholders (R. 8-9).

During the course of the reorganization the Debtor was found to be insolvent (Prior record, p. 31 *). Thereafter and in 1938, the Plan of Reorganization, consisting of a separate Plan for each Series of bonds and a General Plan, was confirmed (R. 8). The separate Series Plans, except one, were all substantially the same (R. 9).

All Series of bonds were guaranteed by The Prudence Company, Inc. which also went into reorganization, was found to be insolvent, and was reorganized and succeeded by a new company named Prudence Realization Corporation (Prior record, p. 30). The Prudence Company, Inc.

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* "Prior record" as used in this brief and in the petition refers to record in petition for certiorari, *Prudence Realization Corporation* v. *Eddy*, 333 U. S. 845.

held some bonds of each Series and in the proceeding for reorganization of Prudence-Bonds Corporation such bonds were subordinated to the bonds in the hands of the public (Prior record, pp. 31-34).

The Plan of Reorganization of Prudence-Bonds Corporation provided, in part, for a New Corporation of the same name as the Debtor to be owned by the bondholders, for an extension of the maturity of the bonds, and changes in interest provisions (R. 78). Eleven Banks had been Trustees of the bond issues (R. 9). Under the Plan, City Bank Farmers Trust Company became Trustee of all Series under a Supplemental Trust Agreement with respondent, the new Prudence-Bonds Corporation (R. 78). Upon confirmation, jurisdiction was reserved to effectuate and carry out the Plan (R. 78).

As part of the proceedings to carry out the Plan, the bankruptcy court, among other things, authorized and directed the former Corporate Trustees of the bond issues to account in the reorganization court for their acts as Trustees (R. 9). Jurisdiction over the accountings was upheld in *Central Hanover B. & T. Co.* v. *President and Directors of the Manhattan Co.*, 105 F. 2d 130. There then ensued extensive litigation relating to the accountings which has been the subject of several further decisions of the District Court and of the Court of Appeals and several petitions for certiorari.*

On the accountings in fifteen of the eighteen Series on bonds approximately $4,277,100 was recovered for the Trust Funds and allowances for services and expenses in connection therewith were heretofore awarded by the bank-

* *Manufacturers Trust Co.* v. *Kelby*, 125 F. 2d 650, cert. denied 316 U. S. 697; *Brooklyn Trust Co.* v. *Kelby*, 134 F. 2d 105, cert. denied 319 U. S. 767; *President and Directors of the Manhattan Co.* v. *Kelby*, 57 F. Supp. 839, modified and affirmed 147 F. 2d 465, cert. denied 324 U. S. 866; *Eddy* v. *Kelsey*, 148 F. 2d 323; *In re Prudence-Bonds Corporation*, 76 F. Supp. 643; see also, *Eddy* v. *Kelby*, 319 U. S. 755, and *Eddy* v. *Kelby*, 163 F. 2d 56, cert. denied 332 U. S. 836, relating to allowances in the accounting proceedings.

ruptcy court (R. 9). The accountings in two Series are pending (R. 9).

In the fall of 1945, following the collection of a large judgment against one of the accounting Corporate Trustees, a question arose regarding the meaning of provisions of the Plan relating to interest payable on the reorganized bonds (R. 9-10).

The services for which petitioner Silbiger was awarded the instant allowance of $75,000 (R. 5), were rendered in the proceeding in the reorganization court which determined this question (R. 10-18), and which, for convenience, has been called the "Construction Proceeding" (R. 4). The question arose in this way:

The Trust Funds of some Series contained collateral sufficient to pay the principal of the publicly held bonds of the Series and leave an excess in principal account, but the excess was not sufficient to pay the arrears of interest on such bonds at the original bond rate. The Trust Funds of other Series are insufficient to pay the principal of the publicly held bonds of the Series. The Plan, as confirmed, provided that interest on the bonds was payable at the rate of 5½% per annum, but only to the extent that income on the Trust Fund collateral would suffice to pay such interest, and, in substance, that no payments of principal or interest were to be made on the subordinated bonds of a Series until the publicly held bonds of the Series were paid in full (R. 9-10; also Prior record, pp. 31-34). The Plan further provided that upon retirement of all bonds of a Series all collateral remaining in the Trust Fund was distributable, when liquidated, *pro rata* among the other Series of bonds (R. 10).

The main question which thus arose was how collateral in principal account of the Series in excess of an amount sufficient to pay the principal of the publicly held bonds of the Series was distributable among the three classes of creditors having an interest therein; namely, 1) the pub-

licly held bonds, 2) the subordinated bonds, and 3) the other Series of bonds.* This in turn raised the question: When were the publicly held bonds to be deemed paid in full? Were they paid in full upon payment of principal with income interest only, or were they entitled to unpaid interest at the original bond rate and to have such arrears of interest paid out of the corpus of the Trust Funds before any payments could be made to subordinate lienors? †

To obtain a judicial determination of the question respondent, the new Prudence-Bonds Corporation, and City Bank Farmers Trust Company, the new Trustee of all Series, petitioned the reorganization court for instructions (R. 10-14).

The issue was referred to a Special Master who reported, in substance, that the bonds were income bonds on which interest was payable only to the extent earned on the collateral.

Under the Special Master's Report, collateral in excess of the principal of the publicly held bonds of a Series was distributable first, to pay the principal of the subordinated bonds of the Series, and the balance then remaining was distributable *pro rata* among the other Series of bonds,

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* In the Fifth and Ninth Series there was an additional creditor. The Bank, which was the former Trustee, obtained on payment of the surcharge recovered against it liens of $85,825 and $88,124.98 on the Fifth and Ninth Series Trust Funds respectively (R. 9). These liens were subordinated to all bonds of the respective Series, including the subordinated bonds (R. 9), and thus had priority over the above mentioned class 3 creditors, namely, the other Series of bonds. In addition, the judgment against the Bank provided that if the bonds of either the Fifth or Ninth Series were "paid in full", the Bank could apply "for relief by way of repayment to it of any surplus remaining in the Trust Fund" (R. 9).

† Certain subsidiary questions relating to adjustments of funds between principal and income accounts were also involved in the "Construction Proceeding", but these questions became moot by the decision of the Court of Appeals on the main question (*Eddy* v. *Prudence-Bonds Corporation*, 165 F. 2d 157).

with the exception that in the Fifth and Ninth Series the above mentioned subordinate liens of the Bank were to be paid first out of collateral remaining after payment of the principal of the subordinated bonds of said Series respectively.

The Master's Report was confirmed by the District Court Judge, and on appeal taken by petitioner Eddy and others the order of the District Court was reversed (*Eddy* v. *Prudence-Bonds Corporation,* 165 F. 2d 157), certiorari was denied (333 U. S. 845) and the "Construction Proceeding" was concluded in July, 1948 (R. 14-15).

Under the decision of the Court of Appeals, collateral remaining in principal account of a Series after payment of the principal of the publicly held bonds of the Series is distributable on account of arrears of interest on the publicly held bonds computed at the original bond rate to the date of final payment of principal (165 F. 2d 157).

Following the conclusion of the "Construction Proceeding", petitioner Silbiger and others applied for allowances. The allowance applications were first passed upon by a Special Master whose Report was confirmed (with one modification not here material) by order of the District Court dated July 29, 1949 (R. 3-5, 30-32), which is the order petitioners sought to appeal (R. 50, 75).

The services rendered by petitioner Silbiger in the "Construction Proceeding", were substantially as follows: He attended three hearings before the Special Master, but did not examine any witnesses, introduce any evidence, or file any affidavits. He filed a memorandum with the Master, objections to the Master's Report, attended two hearings on the Report, and filed a brief with the District Court. He prepared notices of appeal, designations as to the contents of the record and he prepared the record on appeal. He moved to consolidate the appeals and for a preference, neither of which motions was opposed. He filed a brief and a reply brief with the Court of Appeals,

argued the appeal orally, filed a brief in opposition to the petition for certiorari, and had a part in the preparation of the orders on the mandate of the Court of Appeals (R. 11-12, 15-16). Petitioner Silbiger did not prepare the petitions and orders to show cause which instituted the "Construction Proceeding", he did not prepare the orders of reference, nor did he prepare the orders of the District Court (R. 11-12).

Petitioner Silbiger, who had the burden of proving his services, estimated he devoted in excess of 200 days to the "Construction Proceeding", but based his estimate on recollection which he could not substantiate by any diary or docket entries (R. 19). In supporting his estimate of time he claimed, for example, that in one period of 39 days he devoted 38 full days and many nights, including Christmas, New Year's Day, and five Saturdays and Sundays, notwithstanding that in the same 39-day period he devoted many days to other matters (R. 19). Petitioner Silbiger further claimed he devoted 30 days considering whether he would appeal, many more days preparing the record on appeal, and another 30 days writing his brief on the appeal, notwithstanding that such brief was substantially the same as his brief in the District Court (R. 19).

In his brief on the appeal in the "Construction Proceeding" petitioner Silbiger said, "In the case at bar no dispute as to any facts ever arose. * * * The only issues presented herein are issues of law, involving the interpretation of the plans * * * " (R. 16). In his brief in opposition to the petition for certiorari in the "Construction Proceeding" he said, "No controversy of public interest or importance with respect to legal principles is involved" (R. 17).

For his services solely in the "Construction Proceeding", involving no dispute of facts and only one appeal,

petitioner Silbiger requested an allowance of $459,500; he was awarded $75,000 (R. 17).*

I

Appeal from the order on allowances could be had only at the discretion of the Court of Appeals.

In *Dickinson Industrial Site, Inc.* v. *Cowan,* 309 U. S. 382, this Court held that under Section 250 of the Bankruptcy Act appeals from orders on allowances in corporate reorganizations "may be had only at the discretion of the Circuit Court of Appeals".

In attempting to avoid the rule of the *Dickinson* case, petitioners contend that the services petitioner Silbiger rendered in the "Construction Proceeding" "were not such as are comprised within or intended to be regulated by Article XII of the Bankruptcy Act" (Petition, p. 13). Petitioners further contend that the "proceedings for instructions by the new corporation and the Successor Trustee were suits in equity to obtain an adjudication of the rights of conflicting claimants to the trust funds" (Petition, p. 15).

Petitioners' contentions are untenable. The "Construction Proceeding" was a summary proceeding in bankruptcy instituted by petition and order to show cause (R. 10-11, 13-14; see also Prior record, pp. 106-108, 427-429, 490-492, 530-532). The proceeding was instituted while the Debtor's estate was in process of administration under the jurisdiction of the bankruptcy court; it was instituted before the Plan was consummated or carried out, and before a final decree was entered closing the estate.

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* Respondent contended the allowance petitioner Silbiger requested was "so exorbitant as to shock the conscience of a court of equity" (R. 7). Petitioner Silbiger's practice of exaggerating the value of his services is indicated by the fact that in connection with the accounting proceedings he applied for allowances aggregating $389,261.05, as compared with his awards of $69,750 (see pp. 244, 247, 259-260 of record on petition for certiorari in *Eddy* v. *Kelby,* 163 F. 2d 56, cert. denied 332 U. S. 836).

Petitioners' contention appears to be that Section 250 of the Bankruptcy Act is applicable only to services rendered up to the time of confirmation of a Plan and not to post-confirmation services in carrying out a Plan. There is no basis for such distinction. An order confirming a Plan is not analogous to a confirmation of a composition. The latter operates as a discharge, the former is but a step in the administration of the estate; in a corporate reorganization a discharge is affected not by confirmation of a Plan but by the final decree (*Meyer* v. *Kenmore Granville Hotel Co.*, 297 U. S. 160, 166). Until the Plan is fully carried out the estate is in process of administration and the Bankruptcy Act is the controlling statute (*In re Paramount-Publix Corp.*, 82 F. 2d 230, 232-233).

In cases decided under the former Bankruptcy Act involving services in plenary suits to set aside fraudulent transfers, allowances for such services were passed upon by the bankruptcy court. And orders on such allowances were administrative orders governed by former Section 24b (11 U. S. C. 47b), and were appealable only at the discretion of the Court of Appeals (*In re Barceloux*, 74 F. 2d 289, 294).

In *Shulman* v. *Wilson-Sheriden Hotel Co.*, 301 U. S. 172, the allowances were for services in a state court foreclosure suit antedating the Section 77B proceedings. The awards were made after confirmation of a Plan. This Court held that under former Section 24b, appeal from the allowance order could be had only at the discretion of the appellate court. Cf. *Gross* v. *Irving Trust Co.*, 289 U. S. 342. And in the *Dickinson* case, *supra*, this Court said that the history of Section 250 indicated that the purpose of the section was "to carry over into the new act the rule of" the *Shulman* case (309 U. S. 382, 385).

Since the decision of this Court in the *Dickinson* case, *supra*, the Courts of Appeals have uniformly held that Section 250 applies to all orders on allowances in corporate reorganizations. They have consistently declined to en-

graft exceptions on the rule that appeals from such orders may be had only at their discretion (*In re Von Kozlow Realty Co.*, 116 F. 2d 673; *In re Prudence-Bonds Corporation*, 111 F. 2d 37, 41, reversed on other grounds, 311 U. S. 579; *In re Country Club Bldg. Corp.*, 128 F. 2d 36; *In re Seville Court Apt's Bldg. Corp.*, 134 F. 2d 232; *Cohen* v. *Casey*, 152 F. 2d 610; Cf. *Gross* v. *Bush Terminal Co.*, 105 F. 2d 930; *R. F. C.* v. *Bankers Trust Company*, 318 U. S. 163).

Petitioners' contention that petitioner Silbiger's right to an allowance stems from Section 475 of the Judiciary Law of the State of New York providing for an attorney's lien on a cause of action or judgment therein is without merit. The bankruptcy court's jurisdiction is exclusive and embraces all services in connection with the reorganization proceeding, in connection with the Plan, and incident to the reorganization (*Leiman* v. *Gutman*, 336 U. S. 4; *Brown* v. *Gerdes*, 321 U. S. 178).

II

The Court of Appeals did not abuse its discretion in denying petitioners' application for leave to appeal.

Petitioners have failed completely to show any abuse of discretion on the part of the Court of Appeals in denying their petition for leave to appeal. Petitioners in the Court below and in this Court have not made out any *prima facie* case of inequitable treatment by the bankruptcy court in respect of the allowance to petitioner Silbiger. His allowance of $75,000 was generous, if indeed not excessive, for services in a proceeding to construe a Plan of Reorganization involving no dispute of facts and only one appeal, particularly in the light of the facts that petitioner Silbiger did not render extensive services or institute the "Construction Proceeding" or prepare any of the basic

pleadings (see *supra*, pp. 9-10). Moreover, as we have pointed out, *supra*, pages 3-4, the Court of Appeals, after hearing respondent's appeal on the merits, has determined that petitioner Silbiger opposed and was disloyal to one group of bondholders he represented and that his allowance should therefore be reduced.

Petitioners' contention that the law regarding allowances in bankruptcy "is in a hopeless, chaotic state if what is 'reasonable' for an attorney to charge and expect to be awarded * * * is entirely dependent upon accident, whether he appears before a Judge Hough, a Judge Valente, or any other Judge of like psychology" (Petition, p. 23) is frivolous.

This Court has several times expressed its views on bankruptcy allowances (*In re Gilbert*, 276 U. S. 294; *Realty Associates Sec. Corp.* v. *O'Connor*, 295 U. S. 295; *Callaghan* v. *R. F. C.*, 297 U. S. 464; *Dickinson Industrial Site, Inc.* v. *Cowan, supra; Brown* v. *Gerdes, supra; Leiman* v. *Gutman, supra*).

Percentage fees allowed in stockholders' suits cited by petitioners are not pertinent. The allowances in such suits were payable by solvent individuals or corporations, such as John D. Rockefeller, National City Bank, The Chase Bank and General Motors Corporation. A proceeding in bankruptcy to construe a plan of reorganization is not comparable to a stockholders' suit resulting in large recoveries for a going concern. As the Court said in *Winkelman* v. *General Motors*, 48 F. Supp. 504, 507, cited by petitioners (and in which the Court referred to articles by Mr. Hornstein in the Columbia Law Review, also cited by petitioners): "* * * large percentage fees * * * have been the subject of considerable comment, if not more" and "Precedents as to percentages allowed are of slight value because the amounts varied in the cases cited as did the effort required to make the recovery".

CONCLUSION

The petition for writs of certiorari should be denied.

Respectfully submitted,

CHARLES M. MCCARTY,
Counsel for Respondent
Prudence-Bonds Corporation
(New Corporation).

March 27, 1950.

APPENDIX

The Bankruptcy Act, as amended by the Act of June 22, 1938 (c. 575, 52 Stat. 840; 11 U. S. C., Sec. 650):

> "SEC. 250. Appeals may be taken in matters of law or fact from orders making or refusing to make allowances of compensation or reimbursement, and may, in the manner and within the time provided for appeals by this Act, be taken to and allowed by the circuit court of appeals independently of other appeals in the proceeding, and shall be summarily heard upon the original papers."